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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 69

UNITED STATES OF AMERICA, *Appellant*,

v.

RALPH L. SAMPSON, ET AL., *Appellees*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

OPINIONS BELOW

The opinion of the district court (R. 55-63) is unreported. The opinion of the Court of Appeals for the Fifth Circuit certifying the appeal to this Court (R. 67-70) is reported at 298 F. 2d 826.

JURISDICTION

The judgment of the district court was entered on March 1, 1961 (R. 55, 60, 64). On March 30, 1961, the Government filed a notice of appeal to the Court of Appeals for the Fifth Circuit (R. 65-66). On January 18, 1962, the court of appeals, holding that the judg-

ment dismissing 35 counts of the indictment was based on a construction of the mail fraud statute, certified the appeal to this Court pursuant to 18 U.S.C. § 3731 (R. 67-70, 71). On February 23, 1962, the Government moved this Court to remand the case to the court of appeals. On April 2, 1962, this Court denied the Government's motion and noted probable jurisdiction (369 U.S. 836; R. 72). The jurisdiction of this Court rests upon 18 U.S.C. § 3731.

QUESTIONS PRESENTED

1. Where allegedly there is a continuing plan to extract money from divers persons in personal interviews through false representations, and where in a particular transaction the accused have received the full payment sought from the victim, does a subsequent mailing to a victim enclosing a copy of the contract and discussing its performance, allegedly designed to "lull", constitute a mailing "for the purpose of executing" a scheme or artifice to obtain money by false pretenses within the meaning of the mail faud statute?

2. Does the mail fraud statute extend to a preliminary mailing which contains no false representations and is not mailed in the execution of a fraud or in an attempt?

3. Where certain persons allegedly conspired to defraud divers persons throughout the United States by collecting advance fees for services purportedly to be rendered, and in the conspiracy employed salesmen to make the fraudulent sales in personal interviews with selected victims, was each salesman a participant in and subject to indictment for every mailing in the business which violated the mail fraud statute without regard to whether or not the mailing was connected

with the transactions for which the salesman had any responsibility?

STATUTE INVOLVED

The mail fraud statute (18 U.S.C. § 1341) provides in part:

> "§ 1341. *Frauds and swindles.*
> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises, . . . *for the purpose of executing such scheme or artifice or attempting so to do,* places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, . . . or knowingly causes to be delivered by mail according to the direction thereon, . . . any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both." (Emphasis added.)

STATEMENT OF THE CASE

The indictment charges that the corporate defendant and 23 individual defendants "devised and intended to devise a scheme and artifice to defraud" certain named individuals and "numerous and divers persons throughout the United States" (R. 2). The alleged scheme involved inducing the so-called victims to pay "advance fees" for promised services by means of numerous false and fraudulent pretenses, representations and promises (R. 3-14). It is alleged that one of the 16 defendants who were salesmen would "visit personally" each victim at the victim's place of business (R. 5), and that, in the course of this personal interview, the salesman would, by the false represen-

tations enumerated, induce the victim to sign a contract for services relating to a loan for, or the sale of, the victim's business (R. 7). The salesman would obtain the victim's check for the "advance fee" during the course of such personal interview, and "after a salesman had obtained the check and left the place of business of the victim he would immediately take the check to the bank upon which drawn to have the same converted into a Cashier's Check. . . ." (R. 7). The checks were then transmitted to a regional office of the defendant corporation and deposited in the bank (R. 7-8).

Each of the first 43 counts, except counts 40 and 41, charge the mailing of "an envelope and contents" addressed to specified individuals in one of several Southeastern states. Counts 40 and 41 charge defendants with having placed two newspaper advertisements seeking to employ salesmen. Each of the 43 substantive counts charges that all of the defendants caused each mailing.

The district court dismissed thirty-four counts of the indictment which were based on the mailing to a victim of a copy of the accepted contract and a form letter *after* the check for the advance fee had been obtained and deposited as aforesaid (R. 7-8). This mailing is described in the indictment as follows:

> "3. That following the said acceptance of the victims' applications the defendants would mail to said victims a signed copy of the accepted application, together with a form letter, for the purpose of lulling said victims by representing that their applications had been accepted and that the defendants would therefore perform for said vic-

> tims the valuable services which the defendants had falsely and fraudulently represented that they would perform. That a further purpose thereof was to inform said victims that they could not obtain a refund of their fees, and that the contract was not cancellable and that the said victim was bound thereby and had no recourse for retrieving his money." (R. 8.)

Samples of this so-called "lulling" letter and acceptance contract have been incorporated in the record (R. 49-51). The letter enclosed a signed copy of the contract and discussed its performance. When this mailing occurred, the defendants had already obtained the victim's "advance fee" and did not intend to obtain more money from him. Although this is not entirely clear from the Government's statement of the case, it seems to be conceded elsewhere that the victims had "already parted with their money" when the mailings occurred. (Brief for the United States, pp. 2, 5, 7.) Nothing in the indictment suggests that the material mailed to one victim was part of the execution of a fraud against another victim. On the authority of *Kann* v. *United States,* 323 U. S. 88, and *Parr* v. *United States,* 363 U. S. 370, the district court dismissed all counts of the indictment based on these mailings since "the money had already been obtained from such victims prior to such mailings" (R. 60).

The district court did not dismiss seven counts (counts 2, 7, 12, 16, 31, 33 and 38) which were based on the mailing of a certain leaflet to a prospect before a salesman called to present the fraudulent proposal for the sale of services and before any money was obtained from the victim. The leaflet contained a very

brief summary of commercial financing methods and a list of commercial and business affiliations of the defendant corporation. It called for no reply. The detailed charges of misrepresentations made to a victim include no reference to the leaflet. A sample of such leaflet was attached to a "Supplemental Brief" filed by the Government in the district court and is included in the record (R. 52-53).[1]

The district court also declined to dismiss two counts (40 and 41) which were based upon the mailing of newspaper advertisements seeking to employ salesmen (R. 28-30). The advertisements are not alleged to have contained any misrepresentations to customers.

The district court also dismissed count 44, the conspiracy count. Each of the defendants was named in each of the 44 counts. The defendants were the corporate employer, five individuals who served at an overall managerial level (including the three principal organizers, executives and directors of the business), two individuals who served successively as regional director of the Atlanta region, and sixteen salesmen who worked in the area covered by the Atlanta regional office (R. 3). The defendant corporation had its home office in Los Angeles (R. 52) and had regional offices in New York, Chicago, Dallas, Denver and Atlanta (R. 51). Its salesmen worked on a "straight commission" and called on prospects in several southeastern states whose names were furnished to them (R. 29, 30). It is not alleged that the salesmen had any financial

[1] Defendants make no point of the fact that this leaflet is not described in the indictment (except insofar as this may indicate its lack of significance in the alleged scheme), but treat the issue as if the mailings of these leaflets had been specifically charged in the indictment.

interest or responsibility beyond the sales which each made. The mailings alleged were addressed to victims in the States of Georgia, South Carolina, North Carolina, Florida, Alabama, Mississippi and Kentucky (R. 14, 16, 18, 19, 20, 26). All of the defendants, including the salesmen, are charged with having caused the mailing alleged in each substantive count, including the newspaper advertisements referred to in counts 40 and 41.

SUMMARY OF ARGUMENT

1. The district court properly dismissed the 34 counts which were based on mailings by defendants after they had received all the money they expected to receive from a victim. The mail fraud statute prohibits any mailing "for the purpose of executing such scheme or artifice or attempting so to do." A scheme or artifice to obtain money by false pretenses is executed when the fruits of the fraud come into the possession of the wrongdoer. The offense of fraud is committed at the time of the wrongful conversion and cannot be undone. A subsequent mailing which may have a tendency to lull or pacify is not "for the purpose of executing" the fraud within the meaning of the statute.

Although a mailing after conclusion of a fraudulent transaction may under certain circumstances be for the purpose of executing a second fraudulent transaction, no such circumstances existed in this case. Each fraudulent transaction was aimed at a different victim. The "lulling" of one victim had only the most remote and speculative relationship, if any, to the fraud on a subsequent victim, and thus was not a part of the execution of a subsequent fraud on another victim.

The narrow scope of the mail fraud statute is emphasized when its requirement that a mailing be "for the purpose of executing" a fraud is contrasted with the broader language of certain recent statutes, particularly one statute which prohibits certain acts "in the execution *or concealment*" of a scheme to defraud. It is also highly significant that in 1961 Congress declined to include fraud and false pretenses within the coverage of an extremely broad statute prohibiting mailings which "facilitate" certain unlawful businesses.

2. A mailing in the business of the defendant corporation which was at most preparatory was not "for the purpose of executing" the fraud or "*attempting* so to do." There cannot be an attempt to obtain money by false pretenses unless some false pretenses have been made. Defendant corporation's newspaper advertisements soliciting salesmen for employment were not attempts to obtain money by false pretenses. The same is true of a brief leaflet on commercial lending transactions which was sent before any salesman called on the customer. The leaflet contained no offer nor did it call for any reply.

The Government ignores the limitations of the mail fraud statute and seeks in effect to extend it to cover any mailing in the course of defendants' business, or, as the Government would express it, which advances its long range plans. Such broad extension of Federal jurisdiction in fraud cases would be contrary to the intent of Congress.

3. Dismissal of the conspiracy count should be upheld on two separate and unrelated grounds.

(a) None of the substantive counts on which the conspiracy count is based charges a Federal offense under the mail fraud statute. The conspiracy count, therefore, cannot stand.

(b) All of the 43 so-called substantive counts are in reality conspiracy counts which duplicate each other and count 44, the conspiracy count. Each "substantive" count alleges a conspiracy and charges all defendants *as a group*. Under no reasonable theory of vicarious responsibility could each of the 16 salesmen, who had very limited financial interest and responsibility in the enterprise, be punished for the substantive offenses arising from the employer's use of the mails (1) in advertising for salesmen, (2) in sending preliminary materials to a prospect with whom the salesman had no remote connection, or (3) in mailing copies of the contract and other papers to a victim with whom the salesman had no remote connection. When challenged by a motion for a bill of particulars, the Government elected in the district court to stand on each of these counts as drawn. Since each such count is dependent upon showing the mass conspiracy rather than the individual responsibility of each defendant, they are duplicative of each other. The district court granted limited relief by dismissing only the conspiracy count. Proper procedure would be to require the dismissal of all such counts but one. Otherwise, the practical effect of these 44 mass conspiracy counts would be to deny an individual salesman all possibility of presenting an independent defense or having a fair trial.

ARGUMENT

I.

IN EACH OF THE DISMISSED SUBSTANTIVE COUNTS, THE USE OF THE MAILS AFTER THE RECEIPT OF THE FRUITS OF THE FRAUDULENT TRANSACTION WAS NOT IN EXECUTION OF THE SCHEME OR ARTIFICE TO DEFRAUD WITHIN THE MEANING OF THE MAIL FRAUD STATUTE.

The wrongful extraction of money alleged in each count of the indictment dismissed by the district court occurred at the conclusion of a personal interview between a defendant salesman and an alleged victim, in the course of which numerous misrepresentations were made. Since each of these counts depended upon a mailing made subsequent to the wrongful extraction of the money, the district court concluded in reliance on *Kann* v. *United States*, 323 U.S. 88, and *Parr* v. *United States*, 363 U.S. 370, that the mailing was not "for the purpose of executing such scheme or artifice or attempting so to do" within the meaning of the mail fraud statute (R. 60). It is the position of the defendants that the scheme or artifice was executed when the offense of fraud was consummated by the wrongful extraction of money and, therefore, that the action of the district court was correct. This Court so held in *Kann* and *Parr*.

The particular mailing in question was sent by the defendants to a customer after defendants had received all the money sought from the customer (R. 7-8). The letter (R. 50) enclosed an accepted copy of the contract (R. 51) which had been signed by the customer during the personal interview with the salesman (R. 6-7), and it also enclosed some forms to be sent by the customer to his banker, his accountant, and two suppliers. Allegedly, the letter also put the customer on notice that he could not secure a refund of the fee (R. 8), whereas the salesman allegedly had led him to

believe that his fee would be refunded if a loan were not obtained (R. 11).

The Government's arguments regarding this mailing are in the alternative. The first phase of its argument apparently assumes for purposes of the argument that the statutory reference to the execution of a scheme or artifice to defraud or obtain money by false pretenses contemplates the execution or consummation of a particular fraudulent transaction.[2] To this extent, this assumption adopts the rule laid down in *Kann* and *Parr*. Proceeding on this assumption, the Government argues in effect that the mailing of the notification of acceptance was necessary to complete the execution of the fraud because until then the victim had a contractual right to a refund of his money and the defendants had not received the money "irrevocably." It states:

> "Indeed, forwarding an accepted copy of the service agreement was the sacramental mode of cutting off the victim's contractual right to a refund of his money . . . ."
>
> "Only after notification of acceptance did the swindlers obtain even paper title to the funds. Until then, the fraud was incomplete." (Brief for the United States, pp. 15, 16.)

The second phase of the Government's argument rests upon the assumption that the reference in the mail fraud statute to the execution of "any scheme or arti-

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[2] This is the phase of the Government's argument ending on page 17 of its brief with the following:

> "Thus, in the setting of the case, even if we follow the district court in looking only to the individual victim as the object of the scheme particularized in each count, we must conclude that the acts alleged, in each case, supported a charge of mail fraud."

fice" to defraud or obtain money by false pretenses is not confined to the commission of a single offense against a particular victim but can encompass activities over a long period of time carrying out "a single elaborate plan" to perpetrate many frauds against divers persons (Brief for the United States, p. 17). The term "scheme or artifice" as used in the statute is thus construed by the Government in this case as including the entire plan of operations of the defendants extending from before March 9, 1956 to June 1, 1959, *i.e.*, a prolonged conspiracy. Operating upon this legal assumption, the Government makes the further legal assumption that a mailing which aids in carrying out the entire plan of operations is a part of the execution of the plan and within the prohibition of the statute. On the basis of this construction, the Government then argues that the mailings in question were a part of the entire plan of operations because they were in each instance intended to "lull" the victim and thus avoid discovery (Brief for the United States, p. 18). It argues that discovery would lead to complaints and adverse publicity warning off prospective customers or causing a cessation of business to avoid "the approaching arm of the law." Thus, it concludes that the alleged "lulling" was for the purpose of concealing the crime and permitting the defrauding of further victims.[3]

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[3] While this is not the place to argue the merits, we find difficulty in accepting some of the inferences in the Government's brief. If the customer had been told he would get a refund of his fee if no loan were made, a letter advising him to the contrary would not be a concealment. On the contrary, it would constitute a prompt announcement that he had been misled on this point. Moreover, a direction to the victim to call the transaction to the attention of his banker and accountant, the two sources most likely to recognize a fraud and know what to do about it, is not a concealment.

Instead of looking to each basic transaction of fraud and the use of the mails in the *execution* of the scheme to commit such fraud, the Government in the second phase of its argument looks to the entire *plan* or *conspiracy* to commit divers frauds on "an almost endless number of potential victims" for more than three years (Brief for the United States, p. 17). This is to be distinguished from the first phase of its argument to the effect that the mailings were made "for the purpose of executing" a particular fraud. In both of its arguments, the Government avoids the statutory phrase "for the purpose of executing" and argues instead that the mailings "advanced the plot" and "furthered the scheme" (Brief for the United States, pp. 10, 13, 14). At this point an analysis of *Kann* and *Parr* will show that both of these arguments have already been fully considered and rejected by this Court.

The decisions in Kann and Parr

In both *Kann* and *Parr* the indictment alleged, as it does in the present case, a "continuing scheme" to defraud. The duration of the scheme in *Kann* was more than a year and in *Parr* more than four years.

In *Kann* the indictment charged a scheme to defraud a corporation (Triumph) and its stockholders through the diversion of its profits to the defendants. In one count, the Government relied on the mailing of a check given to defendants by an innocent contractor, who was doing work for Triumph, in payment for certain timber which defendants represented they owned but which in fact was owned by Triumph. The contractor was expected to secure reimbursement for this payment as an item of cost under his contract with Triumph. The Government relied on the mailing of

the check by the bank at which defendants cashed it to the bank on which it was drawn. In the other count, Elk Mills (in which the victim Triumph had a 51% interest) delivered a $5,000 check on its bank to one of the defendants who, after endorsing it, deposited it for credit to his account in another bank, following which the check was cleared through the mails. This check represented profits of Triumph which had been wrongfully diverted to Elk Mills pursuant to the scheme to defraud. In both instances the defendants, though they had received payment, were necessarily dependent upon the clearance of the checks in question. In the first instance, for example, the receipt of the payment from the innocent contractor was but a precedent to the next important step—the collection by the contractor from Triumph, the ultimate victim. Any disturbance of this contemplated procedure could have brought inquiry which would have put Triumph on notice of the continuing frauds. The offense of fraud, however, had been committed and brought to consummation upon the receipt of the money.[4]

Likewise, in *Parr*, the defendants' receipt of the filling station products and services described in counts 17, 18 and 19 of the indictment constituted in each instance the consummation of the underlying crime of fraud or receipt of money or property by false pretenses. The security of the defendants in

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[4] The general rule is that the offense of obtaining money or property by false pretenses occurs when the money or property is wrongfully converted to possession by the wrongdoer. See, *e.g.*, *Updike* v. *People*, 92 Colo. 125, 18 P. 2d 472; *Green* v. *State*, 52 Ga. App. 18, 182 S.E. 74; *People* v. *Shapiro*, 299 Ill. App. 255, 20 N.E. 2d 107; *State* v. *Hartman*, 364 Mo. 1109, 273 S.W. 2d 198; *State* v. *Whitledge*, Mo. Sup. Ct., 269 S.W. 2d 748; *Schoenbeck* v. *State*, 163 Tex. Crim. App. 14, 288 S.W. 2d 121.

carrying out their continuing conspiracy to defraud the school district depended, of course, upon the undisturbed sending of bills by the oil company to the school district, the ultimate victim, and the return of checks from the victim to the oil company. The underlying crime of fraud, however, was fully executed and irrevocably committed when the property was wrongfully received by the defendants.

In both *Kann* and *Parr*, this Court, after stating that the mail fraud statute reached "only those limited instances in which the use of the mails is a part of the execution of the fraud," held as follows:

> "We hold, therefore, that one element of the offense defined by the statute, namely, that the mailing must be for the purpose of *executing the fraud*, is lacking in the present case. The judgment must be reversed." *Kann* v. *United States*, 323 U.S. 88, 95. (Emphasis added.)

A preliminary point considered by the Court in *Kann* was whether the defendants could be deemed to have received payment when they deposited or cashed each fraudulently obtained check. Defendants argued that this was so because the check then became "irrevocable as respects the drawer." 323 U.S., at 93. In upholding this position the Court stated:

> "The scheme in each case had reached fruition. The persons intended to receive the money had received it irrevocably." 323 U.S., at 94.

The checks had been irrevocably converted into cash or credits for the uses of the defendants despite their clear civil liability to repay the money. When the checks were converted, it passed beyond the power of

the defendants to undo the crime. The fraud was therefore executed.[5]

In *Parr*, this Court relied squarely on the holding of the *Kann* case in reversing convictions on counts 17, 18 and 19, where in each count the mailing consisted of a bill to the school district for the fraudulently obtained gas and service or a check from the school district in payment of such bill. As in *Kann*, the decisive point was that the mailing came after the wrongful receipt of the fruits of the fraud. This Court quoted the holding in *Kann* that the mailing must be "a part of the execution of the fraud." 363 U.S., at 394. In both instances, the fraud was executed when the defendants received the fruits of the fraud, and the commission of the underlying crime of fraud was in no wise dependent upon the subsequent collection of the money from the intended victim, which in *Kann* was Triumph, and in *Parr* was the school district.

Nothing in the Court's dictum in *Kann* distinguishing cases that would not be governed by the decision is inconsistent with the rationale that mailings subsequent to the execution of the fraud are not a part of its commission. The Court made the following distinctions:

> "The case is to be distinguished from those where the mails are used prior to, and as one step toward, the receipt of the fruits of the fraud, such as *United States v. Kenofskey*, 243 U.S. 440. Also to be distinguished are cases where the use of the mails is a means of concealment so that further

[5] The opinion of the Court in *United States* v. *Kenofskey*, 243 U.S. 440, 443, quotes the acknowledgment of the Government that "The most vital element in the transaction . . . [was] . . . the payment and receipt of the money . . . . " The Court added, "Such payment and receipt would indeed have executed the scheme . . . . "

frauds which are part of the scheme may be perpetrated." 323 U.S., at 94-95.

The second distinction in the foregoing quotation, referring to "further frauds", covers instances where a mailing is part of the execution of a continuous fraud, such as check kiting, or where a mailing subsequent to one fraud contributes to the execution of further frauds upon the victim. See, for example, *United States v. Lowe,* 115 F. 2d 596 (7th Cir.), cited in the *Kann* dictum, where the defendant was able to maintain a credit at a bank through the fraudulent use of a check kiting scheme. The maintenance of the credit depended upon the time consumed in clearing checks through the mails, and was a continuous fraud against the bank extending over such period of time as the credit existed. Similarly, in *Dunham v. United States,* 125 F. 2d 895 (5th Cir.), also cited in the *Kann* dictum,[6] one of the purposes of the mailings to victims, as the defendant himself testified, was "in order to get new money" from them. 125 F. 2d, at 896.

The Government argued in *Kann* that the conspiracy of the defendants encompassed further frauds and that the clearing of the checks (such as the check of the innocent contractor who later was to bill the victim) was a contemplated part of the entire plan. In response to this argument, the Court said:

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[6] A third case cited by the Court, *United States* v. *Riedel,* 126 F. 2d 81 (7th Cir.), is not on its face pertinent to the Court's dictum regarding "further frauds", because the facts reported in that decision do not show that any "further frauds" were involved. Moreover, six of the nine counts in *Riedel* were based on violations of the Securities Act of 1933 (48 Stat. 84 (1933), 15 U.S.C. § 77q (1958)), which does not require that a mailing be "for the purpose of executing" a fraud. But cf. *Getchell* v. *United States,* 282 F. 2d 681 (5th Cir.).

> "The Government argues that the scheme was not complete, that so long as Elk Mills remained a sub-contractor the defendants expected to receive further bonuses and profits and that the clearing of these checks in the ordinary course was essential to its further prosecution. But, even in that view, *the scheme was completely executed as respects the transactions in question when the defendants received the money intended to be obtained by their fraud,* and the subsequent banking transactions between the banks concerned were merely incidental and collateral to the scheme and not a part of it." 323 U.S., at 95. (Emphasis added.)

This response clearly illuminates the Court's construction of the statute as not extending to mailings which, though related to a particular offense, occur after it has already been committed.

Both *Kann* and *Parr* make it clear that even where the plans of the accused contemplated successive frauds against the same victim, a mailing is not a part of the execution of a later fraud merely because it is essential to the plan to conceal an earlier fraud. For example, in *Parr* it was essential to the defendant's plan that the oil company send the bill to the school district, the ultimate victim, and that it be paid. This, however, was not sufficient to make such mailing a part of the execution of further frauds within the meaning of the statute.

Application of Kann and Parr to the present case

The indictment in the present case clearly charges that an offense of fraud or obtaining money by false pretenses was committed when the defendants received a victim's money. As noted in *Kann* and *Parr,* "The persons intended to receive the money had received it

irrevocably." This statement is equally applicable here since the victim here could not have stopped payment on his check after it had been converted into a cashier's check and cashed. Thus the money had been taken wrongfully with the intent of keeping it, and the offense of obtaining money by false pretenses had been executed and could not be undone. The present case, therefore, is squarely covered by the holding in *Kann* and *Parr* that a use of the mails subsequent to the execution of the underlying offense of fraud is not "for the purpose of executing such scheme or artifice" and thus is not within the prohibition of the mail fraud statute.

The Government argues first that the present case may be excepted from this rule because the defendants did not receive the money irrevocably or complete the fraud until the notice of acceptance of the contract was mailed to the alleged victim (Brief for the United States, pp. 15-16). Whether there was or was not a contract between the parties was merely incidental to the offense of fraud. In either case there arose immediately a civil liability to restore the monies. It seems almost a confession of error for the Government to make the argument that the mailing in question was necessary to complete the fraud by giving the defendants "paper title." "Paper title" is merely a selected expression to get around the critical fact that the fruits of the fraud had been irrevocably converted to the possession of the accused.

The lower court cases cited by the Government (Brief for the United States, p. 14) for the proposition that the statute prohibits mailings relating to the retention of money after the execution of the fraud were, with one exception, all decided before *Kann* and, to the ex-

tent they support the Government's argument, are simply irreconcilable with *Kann* and *Parr*. As in certain other lower court cases dealing with the mail fraud statute, the emphasis in these decisions was put on the reprehensible nature of the swindle which had been perpetrated and the limitations of the statutory language were made secondary. This temptation was noted and resisted in the *Parr* case where the majority opinion stated:

> "But the showing, however convincing, that state crimes of misappropriation, conversion, embezzlement and theft were committed does not establish the federal crime of using the mails to defraud, and, under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process." 363 U.S., at 393-94.

Equally untenable is the second phase of the Government's argument that in the present case the "scheme or artifice to defraud, or for obtaining money by means of false . . . pretenses," within the meaning of the statute, encompasses "a single elaborate plan" extending over a period of more than three years, and that any mailing which pacified or lulled one already victimized tended to delay discovery and apprehension by the authorities and so permit the continuation of the fraudulent plan.

By no stretch of the imagination can mailings which tend to delay or prevent discovery and apprehension of an earlier fraud be considered a part of the *execution* of a later fraud against another person merely because, the Government infers, complaints *might* lead to "adverse publicity" which *might* "warn off prospective customers" or *might* cause "the conspirators . . . to

disband before the approaching arm of the law" (Brief for the United States, p. 18). It would be a simpler statement of the Government's case to say that any mailing which is used or contemplated in a swindler's effort to avoid arrest after the commission of a fraud contributes to and, therefore, is a part of the execution of further frauds which would probably be prevented if the swindler received adverse publicity and was sent to prison or forced to flee.[7]

Although the mailings in *Kann* and *Parr* were not actually made by the defendants, though caused by them,[8] their interruption or disturbance would have been more likely to expose the defendants and to prevent further frauds than in the case of the mailing here. For example, in the *Parr* case, the mailing and payment of the bill was essential to place the burden on the ultimate victim. A complaint regarding the propriety of billings or a failure to mail a check to the oil company in payment of the bill could readily have led to exposure of the fraud and its termination. It is more speculative that the complaint of a victim under the allegations of the present case would have affected continued operations. In fact, it is alleged in the present

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[7] In a somewhat comparable situation this Court held that attempting to conceal a conspiracy did not itself constitute a conspiracy. *Grunewald* v. *United States*, 353 U.S. 391.

[8] The Government has successfully argued in many cases that one who commits acts which, in the normal and contemplated course of events, result in the use of the mails "knowingly causes" the mails to be used within the meaning of the mail fraud statute, and without regard to the presence of the element of agency. *Pereira* v. *United States*, 347 U.S. 1, 8-9; *United States* v. *Kenofskey*, 243 U.S. 440, 443. We are confident that the Government does not want to question this rule in attempting to distinguish the present case from *Kann* and *Parr*.

case that there were complaints and that the business continued nevertheless (R. 9).

For authority to support this phase of its argument the Government again relies on certain lower court decisions (Brief for the United States, p. 19), most of which precede *Kann*. Its only cited case on "lulling" subsequent to *Kann* (not including *Marshall v. United States*, 146 F. 2d 618 (9th Cir.), in which the decision was handed down 26 days after *Kann* without any recognition of the earlier case) is *United States v. Earnhardt*, 153 F. 2d 472 (7th Cir.), in which the present question was not squarely raised because, as expressly noted by the Court, the mailing was part of an effort to defraud certain investors as many times as possible by continuing misrepresentations. Moreover, support for the Government cannot be found in the cited case of *Corbett v. United States*, 89 F. 2d 124 (8th Cir.), and perhaps not in *Lewis v. United States*, 38 F. 2d 406 (9th Cir.). The court in *Corbett* stated:

> "As said in the McNear Case, supra, relied upon by appellant, 'A letter is violative of the statute, if its tendency is to lull the recipient into a false sense of security, *as a means of inducing or encouraging him to make further payments as contributions to a fraudulent scheme.*' It is equally violative of the statute to cause a banker to mail a letter when its tendency would be to encourage him to make further loans upon forged bonds and thus contribute to the furtherance of a fraudulent scheme." 89 F. 2d, at 126. (Emphasis added.)

To the extent that other lower court cases may be found which are more in point, they rely upon any mailing in carrying out an overall plan of operations, emphasizing the perfidy of the swindlers and the helplessness of victims, and giving no attention to the limited scope of the

statutory prohibition which, as noted in *Kann* and *Parr*, is that the mails not be used in *execution* of the offense of fraud.

The Government can find little, if any, support in the dissents in *Kann* and *Parr* for either of the alternative positions which it asserts here. The dissenting Justices in *Kann* emphasized first that the defendants had received only a conditional credit or payment until Triumph, the ultimate victim, was defrauded, and that the mailing was therefore an essential step in defrauding Triumph. In the present case, however, the customer was victimized and the money fraudulently extracted from him before the mailing in question. A second ground for dissent noted in *Kann* was that each of the frauds was against the single victim Triumph so that the successful use of the mails with respect to each earlier fraud was essential to the commission of later frauds. Nothing in the indictment in the present case suggests that the material mailed to one victim in any way was part of the execution of the offense upon another customer and, in fact, the contrary is clearly indicated.

Even less comfort can be found by the Government in the dissent in *Parr* respecting the counts pertinent here, *i.e.*, counts 17, 18 and 19. Most important in the *Parr* dissent is the fact that the dissenting Justices approved the decision in *Kann* in the following words:

> "Second, it is urged that, under the rationale of *Kann v. United States*, 323 U.S. 88, the mailings, even if caused by petitioners, were not in execution of a scheme to defraud because the scheme was consummated once they received the gasoline. *Kann v. United States found an appropriate instance of such a limitation.* ... ." 363 U.S., at 404. (Emphasis added.)

Thus, in 1960, we have the full Court's approval of the earlier decision in *Kann*. The further statement of the dissent is not inconsistent with defendants' position in the present case. The dissent continued:

> "... but it also expressly excepted from the force of the rule situations in which the subsequent mailing has the function of affording 'concealment so that further frauds which are part of the scheme may be perpetrated,' *supra*, [323 U.S.] at 94-95. Here the jury might properly have found that consumption of gasoline for private purposes was but one device of petitioners for turning their control of the District to their personal advantage, and that the continuing presentation and payment of the bills, and not merely the receipt of the gasoline, was the purpose of the scheme." 363 U.S., at 404.

We understand this portion of the dissent to be based on the existence of a continuing series of closely related frauds against the same victim the objective of which was not merely to obtain gasoline from the oil company but to obtain payment of the bills by the ultimate victim. The rationale of the dissent strongly supports the defendants in the present case since before the mailing there was a single irrevocable extraction of all money sought from the ultimate victim.

Construction of the mail fraud statute and related statutes

It is axiomatic that criminal statutes are to be strictly construed, since "the power of punishment is vested in the legislative, not in the judicial department." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95. The principle thus stated by Chief Justice Marshall over a century ago has been consistently adhered to by this Court. *Yates v. United States*, 354 U.S. 298, 304. In *Kordel v. United States*,

335 U.S. 345, 348-49, the Court stated the principle as follows:

> "A criminal law is not to be read expansively to include what is not plainly embraced within the language of the statute (*United States v. Resnick*, 299 U.S. 207; *Kraus & Bros. v. United States*, 327 U.S. 614-622), since the purpose fairly to apprise men of the boundaries of the prohibited action would then be defeated. *United States v. Sullivan*, 332 U.S. 689, 693; *Winters v. New York*, 333 U.S. 507."

The present case concerns not merely the "boundaries of prohibited action," but the boundaries of Federal jurisdiction as well. If a similar state statute were before a state court, the issue would be merely whether the legislature clearly intended to punish the activities in question. Here, this issue includes the further question of how far Congress intended to extend the boundary of its jurisdiction over fraud.

In the *Kann* case, this Court found an ascertainable boundary in the statutory requirement that a mailing must be "for the purpose of executing" a fraudulent scheme, stating:

> "The federal mail fraud statute does not purport to reach all frauds, but only those *limited instances* in which the use of the mails is a part of the *execution* of the fraud, leaving all other cases to be dealt with by appropriate state law." 323 U.S., at 95. (Emphasis added.)

By resort to such vague terms as "lulling and concealment", the Government now seeks to extend the boundary to a degree which cannot be precisely anticipated, but which is well beyond the "limited instances" referred to in *Kann*. It should be noted, too, that this

extension would not be limited to mail fraud alone, because in 1952 Congress enacted a similar statute prohibiting the use of telephone and telegraph facilities "for the purpose of executing" a fraudulent scheme.[9] Thus, any extension of the mail fraud statute would necessarily carry with it a comparable extension where telephone and telegraphic communications were involved. In view of the wide use of the mails and even wider use of telephone communications in almost every business and financial transaction, the Government's loose interpretation of the statute would give rise to Federal jurisdiction in almost all cases where fraud is charged. Any businessman accused of misrepresentation by a dissatisfied customer would face a potential Federal charge if he "lulled" a customer by writing or telephoning him seeking to persuade him that there had been a misunderstanding, or that the goods or services measured up to what had been represented. Any attempt to perform a contract for services, if fraudulent misrepresentations were charged, would be considered "lulling" and, logically, the better the performance the greater the tendency to lull. In fact, almost any communication between a defendant and his accuser could in some loose sense be considered as lulling or concealment. Prosecution would depend more on the prosecutor's discretion than upon statute. Where a line might ultimately be drawn cannot be predicted, but certainly Federal jurisdiction would embrace far more than what this Court has heretofore referred to as "limited instances" of Federal jurisdiction in fraud cases.

It is no answer for the Government to say that it would not propose to assert its jurisdiction over every alleged state offense of fraud where the mails or wire

[9] 18 U.S.C. § 1343 (1958).

communications might later be used for the purpose of "lulling" or pacifying a customer. The question is whether it can be reasonably supposed, in the absence of clear language, that Congress intended to extend Federal jurisdiction to such cases.

Congress constantly reviews Federal coverage of criminal activities involving interstate transportation and communication, and frequently adds new crimes or broadens the application of existing statutes where the need is clear.[10] It has repeatedly dealt with particular types of mailings.[11] Yet in the course of this continual process of re-examination, which has been quite intensive in the past two decades, no effort has been made to extend the application of the mail fraud statute beyond the existing limitations as indicated in the *Kann* case. Moreover, Congress has often considered the aspect of concealment and flight in connection with various statutes dealing with the use of the mails and

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[10] Among many examples are the following: 18 U.S.C. § 1343, relating to fraud by wire, radio or television, was enacted on July 16, 1952 and amended on July 11, 1956, 70 Stat. 523; 18 U.S.C. § 1403, relating to use of comunications facilities in narcotics offenses was enacted on July 18, 1956, 70 Stat. 573; 18 U.S.C. § 2314, relating to transportation of stolen goods and securities, was amended on July 9, 1956, 70 Stat. 507 and on October 4, 1961, 75 Stat. 802; 15 U.S.C. § 1171 relating to transportation of gambling devices was enacted on January 2, 1951, 64 Stat. 1134; 15 U.S.C. § 77q., relating to fraudulent sales of securities, was amended on August 10, 1954, 68 Stat. 686; 18 U.S.C. § 1201, relating to kidnapping, was amended on August 6, 1956, 70 Stat. 1043.

[11] See, *e.g.*, 18 U.S.C. § 876, mailings relating to kidnapping and extortion; 18 U.S.C. § 1302, mailings concerning lotteries; 18 U.S.C. § 1403, mailings and other communications relating to narcotics matters; 18 U.S.C. § 1461, mailings of obscene or crime-inciting matter; and 18 U.S.C. §§ 1714-1717, mailings of firearms, explosives, poison, treasonable matter and other matters.

interstate transportation, and where Congress has intended to use its power over interstate transportation and the mails to reach acts of concealment or flight following the commission of a state crime, it has done so by clear and unmistakable language.[12]

In 1956, for example, Congress adopted legislation aimed at swindling schemes involving, among other things, interstate travel to provide a delay during which the swindler could escape following the fraud.[13] To reach this evil, Congress closely followed the language of the mail fraud statute but expressly added acts of concealment. This statute provides:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution *or concealment* of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more . . . [shall be punished as prescribed]." (Emphasis added.)

It is also significant that, two days after the enactment of the above statute, Congress amended the "wire fraud" statute referred to above and expanded it in one particular but did not broaden it by reference to

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[12] See, *e.g.*, 18 U.S.C. §§ 1071-1073, dealing with fugitives from justice; 18 U.S.C. § 2312, dealing with transportation of stolen vehicles; 18 U.S.C. § 2313, dealing with sale, receipt or concealment of stolen vehicles; 18 U.S.C. § 2314, dealing with transportation of stolen goods, including securities, and also with transportation of persons in the concealment of fraudulent schemes.

[13] 70 Stat. 507, July 9, 1956, amending 18 U.S.C. § 2314.

communications for the purpose of concealment.[14] The statute, as amended, now provides that:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds *for the purpose of executing* such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both." (Emphasis added.)

Thus, within a period of two days, Congress considered two similar statutes, both relating to fraudulent schemes. One statute repeated the narrow requirement of the mail fraud statute that a mailing be "for the purpose of executing" a scheme; the other statute expanded this language to include acts "in the execution or concealment" of a scheme. Since both statutes were considered contemporaneously, the omission of the word "concealment" from the 1956 amendment to the wire fraud statute indicates that Congress did *not* intend for that statute, or the companion mail fraud statute, to cover communications for the purpose of concealment.

A significant extension of Federal criminal jurisdiction occurred in 1961 with the enactment of an amendment to the so-called anti-racketeering statute (18 U.S.C. § 1952 (Supp. III, 1962)). The very broad and comprehensive language of this 1961 statute prohibits, among other things, mailings or interstate transportation to "facilitate the promotion, management, establishment or carrying on" of certain defined "un-

[14] 70 Stat. 523, July 11, 1956, amending 18 U.S.C. § 1343.

lawful activities". The statute thus reaches mailings which merely "facilitate" the "promotion" of the evils sought to be curbed. The statute also prohibits use of the mails or interstate transportation to "distribute the proceeds" of an "unlawful activity" (untaxed liquor, gambling, prostitution, extortion). It is significant that the possibility of including fraud among the unlawful activities was discussed in the hearings before the Senate Judiciary Committee, but the Department of Justice representative indicated that this was not desired.[15] A similar bill introduced earlier by Senator Keating, which would have expressly included fraud, has never been acted upon. (See Appendix, p. 47.)

Thus, in 1961, the Department of Justice declined to seek from Congress legislation which would by express language broaden Federal jurisdiction over state fraud matters; yet, the Government in this case seeks to obtain from this Court an extension of its jurisdiction over fraud, nominally as a "construction" of existing narrow statutory language. Clearly, if the existing statute is too narrow, the remedy is with Congress, especially in view of the policy question involved as

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[15] Herbert J. Miller, Assistant Attorney General in charge of the Criminal Division of the Department of Justice, stated:

> "When you get off into the field of criminal fraud and false pretenses, there is a rather substantial expansion of the crimes committed, because these crimes would be those which either violated the laws of the United States or State laws, and I frankly would not want to expand our jurisdiction to the point where we were overcommitted from an investigative and prosecutive standpoint, and where the line is, I am sure I don't know, but if we add certain additional offense[s], then you increase the scope of the investigation, and, of course, subsequent prosecution by the Federal Government." *Hearings of Senate Judiciary Committee on S. 1653-1658, 1665*, 87th Cong., 1st Sess. 113 (1961).

to the need and wisdom of the extension of Federal police power.

A final reason to reject the particular expansion of statutory language here sought by the Government is that efforts to conceal may continue indefinitely, thus indefinitely extending the statute of limitations. Many years after the conclusion of the state offense of fraud, and long after the running of the state statute of limitations, a mailing or telephone call for purposes of lulling would be a new Federal crime.[16] The comments of Justice Jackson in his concurring opinion in *Krulewitch v. United States*, 336 U.S. 440, are pertinent in this regard. In rejecting the Government's argument in that case that every conspiracy by implication includes a secondary conspiracy to conceal the primary conspiracy, Justice Jackson pointed out that such reasoning

> ". . . would result in an indeterminate extension of the statute of limitations. If the law implies an agreement to cooperate in defeating prosecution, it must imply that it continues as long as prosecution is a possibilty, and prosecution is a possibility as long as the conspiracy to defeat it is implied to continue.
>
> "I do not see the slightest warrant for judicially introducing a doctrine of implied crimes or constructive conspiracies. It either adds a new crime or it extends an old one . . . But it is well and wisely settled that there can be no judge-made offenses against the United States and that every Federal prosecution must be sustained by statutory authority. . . .
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> ". . . We should disapprove the doctrine of im-

[16] In *Clark* v. *United States*, 208 F. 2d 840, cited by the Government, a defendant was convicted of mail fraud for a mailing occurring about ten years after commission of the fraud.

plied or constructive crime in its entirety and in every manifestation." 336 U.S., at 456-57.

No doubt one who commits a crime generally makes efforts to avoid detection. However, it has never been suggested such efforts constitute a new crime unless made so by clear and express language.

II.

THE CONSPIRACY COUNT WAS PROPERLY DISMISSED.

The primary ground for upholding dismissal of the conspiracy count is that none of the substantive counts upon which it is dependent charge a Federal offense. A secondary ground, and the ground upon which the dismissal of this count by the district court was apparently based, is that it merely duplicates the so-called substantive counts which themselves are in fact conspiracy counts.

Defendants took the position, below, and still maintain, that none of the so-called substantive counts charge a Federal offense. If this is correct, then the action of the district court in dismissing the conspiracy count must be upheld because the objective of the conspiracy charged in count 44 consisted of the mailings charged in the other counts.

In the substantive counts not dismissed below, the particular mailings charged to have been made in the execution or attempted execution of the scheme or artifice to obtain money by false pretenses consisted of the following: (1) two newspaper advertisements seeking to employ salesmen (counts 40, 41); and (2) a leaflet mailed by defendants to a prospect before a salesman called containing a summary of various methods used in commercial financing and a list of institutions or associations with which the company had business or

commercial relations[17] (counts 2, 7, 12, 16, 31, 33 and 38). We submit that these mailings were at most merely preliminary and preparatory and did not constitute a part of the *execution* of the alleged scheme or artifice to obtain money by false pretenses or of an *attempt* to do so.

Although the second ground for upholding dismissal of the conspiracy count is an alternative one, and would presumably not be reached unless one or more of the so-called substantive counts were upheld, we feel nevertheless that it raises questions of grave import involving the use or abuse of multiple conspiracy counts under the guise of substantive counts.

A. Mailings which are preliminary to the execution or attempted execution of a scheme to defraud by oral misrepresentations are not covered by the mail fraud statute.

The classification of an act of mailing as criminal or non-criminal under the Federal law must necessarily be determined as of the moment of mailing though, of course, subsequent events may be referred to in ascertaining intent. If defendants had ceased business immediately after the insertion of the newspaper advertisements in question, could each mailing of a newspaper containing no false representations to prospective customers conceivably constitute a Federal offense? Furthermore, if defendants had mailed to a businessman the harmless leaflet containing a brief description of commercial financing, and no salesman ever

[17] Except with respect to the newspaper mailings, all substantive counts charge that the mailing constituting the Federal offense was "for the purpose of executing said scheme and artifice and attempting to do so." The two newspaper counts charge only that the newspaper was mailed "for the purpose of executing said scheme" and no reference is made to attempt. The distinction must be noted, but we have no explanation for it.

called upon the prospect, could each such mailing constitute a Federal offense?

We recognize that it is not necessary for the Government to allege the successful execution of a fraud. We do contend, however, that it must show, at the least, that the mailing was a part of an attempt to commit the offense. In the statutory expression "for the purpose of executing such scheme or attempting so to do," the words "or attempting so to do" serve little purpose except to make it clear that the fraud need not be successful and that no mailing is included unless it has at least reached the status of an attempt to defraud. The question then is whether the preliminary mailing in each of the counts in question had reached the status of an attempt to commit the offense or was merely in preparation for the attempt.

The advertisements for salesmen were so far removed from the execution or consummation of any possible offense of fraud that discussion of the point seems unnecessary, except that it shows the lengths to which the Government's theory would permit it to go. The advertisements constitute rather crude expressions from a person evidently meeting frustration in finding able salesmen (R. 29-30). Before such an advertisement could produce a fraud upon a victim, the following additional steps would be required: (1) response to the advertisement by a prospective salesman; (2) agreement upon terms and conditions of employment; (3) training of the new salesman and his acceptance of the procedures alleged to have been taught by defendants (R. 4-5); (4) a visit by the salesman to a prospect; and, finally, (5) the submission of defendants' proposal to render services, the making of false representations pertaining thereto, and the wrongful collection of money.

A mailing of the leaflet was likewise far removed from the commission of the offense of fraud. That the mailing of the leaflet constituted no part of an attempt to execute the fraud is indicated by the failure of the Government to refer to it in the indictment's highly detailed description of the wrongful conduct constituting the fraud or attempt. The leaflet contained no presentation of a proposition by the defendants and not one of the numerous misrepresentations to customers alleged in the indictment (R. 9-14). According to the indictment, the fraud was perpetrated, or the attempt was made, by means of numerous false representations made by the defendant salesmen in personal interviews with the victims. A mailing of the innocuous pamphlet, containing not one of the alleged moving misrepresentations, was too remote in time, place and causal relationship from the accomplishment of the fraud to constitute an attempt. Under the authorities which follow, such a mailing was not sufficient to constitute an attempt to defraud under State laws, and likewise it was not sufficient to be for the purpose of "attempting" to execute a fraud under the mail fraud statute.

To constitute an attempt to commit a crime, "whether statutory or at common law, there must be some overt act in part execution of the intent to commit the crime . . . . " 22 C.J.S. *Criminal Law*, § 75(2). Classical criminal law imposed the stringent requirement that a defendant must have passed the *locus poenitentiae*, the point of no return, only to be stopped by factors beyond his control before he could be convicted of attempt. We do not insist on such a test but rely rather on that prescribed by Holmes, C. J., in *Commonwealth* v. *Peaslee*, 177 Mass. 267, 59 N.E. 55, 56:

> ". . . If the preparation comes very near to the accomplishment of the act, the intent to complete it renders the crime so probable that the act will be a misdemeanor, although there is still a locus poenitentiae, in the need of a further exercise of the will to complete the crime. . . . [T]he degree of proximity held sufficient may vary with the circumstances, including, among other things, the apprehension which the particular crime is calculated to excite."

But even under this more liberal view attempt requires very close proximity to the consummation of the crime. As stated in *Commonwealth* v. *Kennedy*, 170 Mass. 18, 48 N.E. 770:

> "As the aim of the law is not to punish sins, but is to prevent certain external results, the act done must come pretty near accomplishing that result before the law will notice it."

An attempt is committed when the acts approach the criminal objective "so near the result that, if coupled with an intent to produce that result, the danger is very great", and "there must be a dangerous proximity to success." *Hyde* v. *United States*, 225 U.S. 347, 387-88. Judge Learned Hand has pointed out that "*locus poenitentiae*" is an unsatisfactory criterion in so far as it divides "'attempt' from 'preparation' by the very instant of consummation," *United States* v. *Coplon*, 185 F. 2d 629, 633, but recognized that there is a crucial distinction between preparation and attempt. His yardstick is proximity, as discussed by Justice Holmes in *Peaslee, supra*, and *Kennedy, supra*.

Applying these principles to the present context, it is clear that there can be no attempt to obtain money by false pretenses unless false pretenses have been

made. We find no reported case in which a person has ever been charged with attempt to defraud where false representations had not been made,[18] and in some of these the conduct was held to fall short of an "attempt" even though false representations had been made.[19] Attempt requires at least that "some appreciable fragment of the crime be committed and the act must not be equivocal in nature." *People* v. *Buffum*, 40 Cal. 2d 709, 718, 256 P. 2d 317, 321.

In the case at bar, the essential parts of the execution of the fraud consisted of the presentation of the fraudulent proposition, the making of false representations pertaining thereto, and the wrongful extraction of money. All of these essential parts of the execution occurred in personal interviews some time after the preparatory mailings of the leaflets. The plan to defraud a particular victim had therefore not proceeded sufficiently close to consummation to reach the stage of attempt, and the mailings are not covered by the statute.

The law of attempt is not a technical and outmoded relic but serves the vital function of preventing pro-

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[18] See *e.g.*, *Lemke* v. *United States*, 211 F. 2d 73, *cert. denied*, 347 U.S. 1013; *People* v. *Anderson*, 55 Cal. 2d 655, 361 P. 2d 32; *People* v. *Camodeca*, 52 Cal. 2d 142, 338 P. 2d 903; *People* v. *Mayen*, 188 Cal. 237, 205 Pac. 435, overruled on a different point by *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905, 911; *People* v. *Wallace*, 78 Cal. App. 2d 726, 178 P. 2d 771; *People* v. *Arberry*, 13 Cal. App. 749, 114 Pac. 411 (Case 2); *People* v. *Reed*, 190 Cal. App. 2d 344, 11 Cal. Rptr. 780; *Parker* v. *State*, 29 Ga. App. 26, 113 S.E. 218; *State* v. *Visco*, 183 Kan. 562, 331 P. 2d 318; *State* v. *Howell*, 318 Mo. 772, 300 S.W. 807; *Commonwealth* v. *Evans*, 190 Pa. Super. 179, 154 A. 2d 57.

[19] *People* v. *Werner*, 16 Cal. 2d 216, 105 P. 2d 927, overruled on a different point by *People* v. *Camodeca*, 52 Cal. 2d 142, 338 P. 2d 903; *Nemecek* v. *State*, 72 Okla. Crim. 195, 114 P. 2d 492.

secutions for the mere formulation of a criminal intent. The continuing vitality of this principle appears vividly in Senate opposition to the broad language of the 1961 anti-racketeering statute as originally proposed, which would have permitted prosecution for merely using the mails or interstate transportation with a specified criminal intent.[20] This opposition resulted in an amendment requiring the performance of an act after interstate travel or use of the mails.

The only way in which the Government can hope to sustain the preliminary mailings as being within the statute is by creating confusion between the principles of attempt and the principles of conspiracy. This is what the Government seeks to do in its argument that the mailings were related to defendants' "long range preparation" and their "elaborate plan" (Brief for the United States, p. 17). In making these arguments, the Government rejects the rationale of *Kann* and *Parr* that the question of execution must be determined by reference to each fraudulent transaction, as evidenced by the Court's holding in both of these cases that the scheme was executed "as respects the transactions in question". By the same token, "attempt" must be determined by reference to each transaction.

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[20] *Hearings of Senate Judiciary Committee on S. 1653-1658, 1665*, 87th Cong., 1st Sess. 262 (1961).

> "*Senator Ervin:* . . . This act undertakes to make the crime evil intent rather than a bad act.
> "*Senator Carroll:* I want to say for the record I do not know of any place in criminal law where a man can just be prosecuted because he formulates an intent.
> "*Senator Kefauver:* Gentlemen, we spent about 3 hours on this yesterday, and we are going to have new language. *It is manifest that this present language is not satisfactory.*"

See also similar objections voiced at pp. 251-263.

Instead, the Government implicitly invokes the looser doctrine of conspiracy, where the essence of the crime is the agreement, and a very remote act in furtherance of the agreement is sufficient to be an "overt act". Thus, the Government hopes to avoid the stricter doctrine of attempt, which applies to substantive offenses. But, as Justice Holmes pointed out in *Hyde* v. *United States, supra:*

> "But combination, intention, and overt act may all be present without amounting to a criminal attempt,—as if all that were done should be an agreement to murder a man 50 miles away, and the purchase of a pistol for the purpose. There must be dangerous proximity to success. But when that exists the overt act is the essence of the offense. On the other hand, the essence of conspiracy is being combined for an unlawful purpose; and if an overt act is required, it does not matter how remote the act may be from accomplishing the purpose, if done to effect it; that is, I suppose, in furtherance of it to any degree." 225 U.S., at 387-88.

Some of the lower court decisions cited by the Government illustrate the success which the Government has sometimes had in the past in borrowing conspiracy concepts and terminology and applying these to the substantive offense of mail fraud. The result is that courts sometimes speak of a mailing as being "in furtherance of" a scheme (as the Government does in its brief in this case) and altogether lose sight of the stricter requirement of the mail fraud statute. The preliminary mailings relied on by the Government here illustrate how far the statute can and will be extended

unless the Government is limited to the restrictions expounded in *Kann* and *Parr*.[21]

The essence of the Government's argument is that each and every mailing made by the defendants in the course of their business was a Federal crime. The Government thus seeks to give the mail fraud statute a coverage equally as broad as that of the anti-racketeering statute adopted in 1961 which prohibits, among other things, use of the mails to "*facilitate* the promotion, management, establishment or carrying on" of any "unlawful activity"; and which defines "unlawful activity" as including "any business enterprise involving" untaxed liquor, narcotics and prostitution. Because of the reprehensible nature of these racketeering activities, Congress sought to use the broadest possible language consistent with minimum protection for the innocent. In the present case, however, without the benefit of the broad provisions of the anti-racketeering statute, the Government would have this Court hold that the strict requirement of the mail fraud statute that a mailing be "for the purpose of executing" a fraud may be so broadly applied as to prohibit any use of the mails to "facilitate" carrying on

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[21] Our research discloses two cases applying the mail fraud statute where the mailings unquestionably related to preparation only. *Goldman* v. *United States*, 220 Fed. 57 (6th Cir.); *Edwards* v. *United States*, 249 Fed. 686 (6th Cir.). In the *Edwards* case, the defendant used the mails to order certain raw materials which were made into drugs that were falsely labelled and fraudulently sold. In *Goldman*, the defendant used the mails to advertise for an assistant whom he hoped to persuade to assist him in an extortion racket. The two cases merely demonstrate the reach of the Government's theory and, under our theory, were wrongly decided.

"any business enterprise involving" fraudulent transactions. This position is surprising since, as previously noted, the Department of Justice advised the Senate Judiciary Committee that it did not desire the broad provisions of the anti-racketeering statute to cover fraud. (See page 30 above and Appendix, p. 47.)

B. The conspiracy count duplicates each so-called substantive count.

Our point here is that the group of persons indicted in each so-called substantive count goes so far beyond the limits prescribed by this Court in *Pinkerton* v. *United States,* 328 U.S. 640, and related cases, that each such count is in reality a conspiracy count, not a substantive count at all, and the indictment constitutes a flagrant pyramiding of conspiracy counts.

We recognize that each scheme to defraud participated in by two or more persons is a conspiracy, *Pinkerton* v. *United States,* 328 U.S. 640, 647; and that a participant in a conspiracy to commit a series of frauds can be punished for committing each of the frauds as well as for the conspiracy. *Pinkerton* v. *United States, supra; cf., Pereira* v. *United States,* 347 U.S. 1; *Nye & Nissen* v. *United States,* 336 U.S. 613. *Pinkerton* permits the inclusion of a conspirator in a substantive count, not strictly as an aider and abettor, but as a member of a criminal partnership in which "the partners act for each other in carrying it forward". 328 U.S., at 646. But, necessarily, in order for an accused to have such vicarious responsibility for the acts of his "partners", the "partnership" must encompass the substantive acts so that the accused may

be said to have contributed in some significant way to the commission of the offense.[22]

An individual salesman in the present case was in no sense a partner in the nationwide enterprise, either in respect to financial interest or responsibility. He worked on a "straight commission" and called on prospects whose names were furnished him (R. 29, 30). It is evident from the indictment that his financial interest and his responsibility were confined to the sales which he made or attempted to make; he did not participate in any planning or direction of the entire program, nor of any part of it beyond his limited area of responsibility. In this respect his position is different from that of the heads of the business and others who participated in the overall planning or were in the chain of responsibility with respect to each substantive offense that is charged.[23] A salesman would, of course, be includible in a substantive count where he made the sale or attempted to do so. He also could

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[22] This is the view expressed in a well developed note in the Harvard Law Review, *Developments in the Law—Criminal Conspiracies*, 72 HARV. L. REV. 920, 993-1000, where the extent and limitations of the *Pinkerton* doctrine are discussed. The authors state:

> "Even if there is a strong need for an attack on organized crime, the imposition of a penalty for conspiracy seems adequate to cope with this need, and it seems unjust to hold every member of a conspiracy equally culpable for a substantive offense regardless of the magnitude of his contribution to its commission. . . . " *Id.* at 999.

[23] We acknowledge that any person participating in the conspiracy at a decisional level could be indicted for each substantive offense committed anywhere in the United States. Mere absence from the scene of the crime would not affect his responsibility any more than it did in *Pinkerton*. But for a salesman in Florida, for example, there was both absence *and* lack of responsibility in a sale in Kentucky or California.

be included in a single conspiracy count, but not in forty-four conspiracy counts.

A reference to the indictment in this case will demonstrate that the so-called substantive counts do not meet the tests of *Pinkerton* and related cases, particularly in regard to the sixteen salesmen named in each such count. It would be stretching *Pinkerton* unreasonably to say that a salesman employed by defendant corporation to make fraudulent sales to selected victims in a certain area of the country was thereby guilty of each use of the mails to execute every fraud allegedly committed by the defendant corporation's employees anywhere in the United States during the entire three year period alleged in the indictment. The indictment would carry vicarious responsibility to the ultimate extreme of making a salesman responsible criminally for the employer's use of the mails in an effort to employ salesmen (Counts 40, 41).

The practical effect of this indictment would be to deny a salesman the opportunity of a fair trial. On the so-called substantive counts he could not confine his defense to a showing that there was no misrepresentation in any transaction in which he was the salesman. He must prepare to defend also against the frauds charged against other salesmen in other states and also against the "numerous and divers" other frauds alleged in the substantive counts. It would be for him a Pyrrhic victory if the defendants as a group were acquitted on a transaction in which he himself was the salesman but were then convicted on the 42 other so-called substantive counts on which he could be subjected to a maximum sentence of 210 years in prison, plus a $42,000 fine. He must therefore defend against forty-four mass conspiracy counts. For the

individual salesman the preparation of such a defense would be an impossible task which he would be forced to leave to the principal defendants. In a trial lasting many weeks, and even months, he could not possibly maintain an independent defense.[24] Such circumstances would force him to act as a mere pawn with little chance that the jury could separate his activities and his agreements from the mass.

The indictment drawn in this case places in the prosecutor's hands a tactical weapon of frightening proportions. It raises questions which are particularly grave if the indictment represents not a mere sport in a particular case, but, as we fear, a considered effort by the prosecuting arm of the Federal Government to extend its use of conspiracy charges. This Court has previously recognized the dangers of abuse inherent in charges of conspiracy and we trust that it will disapprove the practice reflected in this case. *Grunewald* v. *United States,* 353 U.S. 391; *Pinkerton* v. *United States,* 328 U.S. 640, 644, n. 4; *cf., Krulewitch* v. *United States,* 336 U.S. 440, 449, 451; *Nye & Nissen* v. *United States,* 336 U.S. 613, 625-27. In *Grunewald,* the court stated:

> "Prior cases in this Court have repeatedly warned that we will view with disfavor attempts to broaden the already pervasive and wide-sweeping nets

[24] For one thing, he would not know what to defend against. On the "substantive" counts involving transactions in which he did not participate, the individual salesman could not know in advance whether his case would go to the jury on the theory of aiding and abetting or on the theory of conspiracy, or both. Moreover, in a mass trial with these multiple counts, the jury, even with the clearest charge, would very probably be unable to divine the true issue and the facts pertinent to his particular defense. An independent effort to defend himself would seem futile.

> of conspiracy prosecutions. The important considerations of policy behind such warnings need not be again detailed. See Jackson, J., concurring in *Krulewitch* v. *United States, supra.*" 353 U.S., at 404.

It would be harsh and callous for the Government to answer that the trial judge, after a long and costly trial, could direct an acquittal for the individual salesman on every so-called substantive count where it was not shown that the salesman participated as an aider and abettor. Counsel for the defendants sought by motion for a bill of particulars to get from the prosecution the few essential facts which would permit this separation to be made before trial (R. 62-63), but the Government refused to divulge the information and was upheld by the district court (R. 63). Thus, the Government has elected to stand on the so-called substantive counts as they were drawn and was not willing by a bill of particulars to provide the few essential facts which would have permitted the court in effect to reduce each mass conspiracy count to a substantive count. Since the Government has thus elected to stand on these counts as drawn and since each such count as drawn is merely a mass conspiracy count, they are duplicative of each other and of the conspiracy count.

The action of the district court in dismissing the conspiracy count was proper so far as it went, but it provided only partial relief. Since the Government chose to stand on all counts as drawn, and since they are all mass conspiracy counts, all but one should have been dismissed on the grounds of duplication. The one remaining count should be upheld only if it otherwise charges a conspiracy to violate the mail fraud statute.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court dismissing 34 of the substantive counts and the conspiracy count should be affirmed.

Respectfully submitted,

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APPENDIX

In the hearings before the Senate Judiciary Committee on S. 1653, a part of the 1961 "anti-racketeering" legislation, Senator Keating referred to the fact that he had previously introduced a bill, S. 710, which was similar to, but in some respects broader than, the pending Department of Justice proposal.[25] Senator Keating's bill would have made it a crime to conspire "to commit any organized crime offense against any of the several states" where any overt act to effect the object of the conspiracy consists of use of the mails or facilities of interstate transportation or communication. *This bill specifically included within the definition of "organized crime offense" any offense relating to "criminal fraud or false pretenses".* Mr. Herbert J. Miller, Assistant Attorney General in charge of the Criminal Division of the Department of Justice, appeared before the Committee and was questioned by Senator Keating regarding the desirability of the broader coverage provided by Senator Keating's bill, S. 710. Mr. Miller replied:

> "Senator, let me answer your question in this way:
> "There is the practical problem, which I will put to one side, as you suggest.
> "The other problem is basically, perhaps, a philosophical one, and that is how far the Federal Government should go in this particular field.
>
> "There are some who would feel, I think, perhaps, that if you put one more criminal violation in, you are going too far. . . . "

Shortly after this statement, the following exchange occurred specifically relating to the desirability of broadening the statute to cover fraud.

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[25] *Hearings of Senate Judiciary Committee on S. 1653-1658, 1665*, 87th Cong., 1st Sess. 94 (1961) (hereinafter cited as "*Hearings*"). S. 710 is reproduced at *Hearings*, 95-96.

"*Senator Keating:* Or would you object to broadening it—you probably would object to broadening it—to include frauds generally, wouldn't you?

"I must differentiate.

"Perhaps not you personally, because you have said you personally would not object to the provisions of S. 710 but would you think, speaking in your official capacity, that there would be objection to broadening it, if S. 710 was not enacted to cover such things as fraud and criminal assault?

"*Mr. Miller:* I would have one field of hesitancy, Senator, in broadening it, for this reason:

"This bill as it now stands is really aimed at what we call organized crime today. When you get off into the field of criminal fraud and false pretenses, there is a rather substantial expansion of the crimes committed, because these crimes would be those which either violated the laws of the United States or State laws, and I frankly would not want to expand our jurisdiction to the point where we were overcommitted from an investigative and prosecutive standpoint, and where the line is, I am sure I don't know, but if we add certain additional offense[s], then you increase the scope of the investigation, and, of course, subsequent prosecution by the Federal Government.

"Now, fraud as a practical matter is not normally the type of crime that you associate with organized crime. . . ." *Hearings,* 113.

The next day, Mr. Miller touched on this question again in response to the comment of Senator Carroll that "this concept could be broadened across the board to any crime".

"*Mr. Miller:* It could be, yes. It could be broadened to any crime. Frankly, that is why we limited it to the four where we felt that there was a serious problem.

"*Senator Carroll:* I am not only thinking, Mr. Miller, of today's necessity; I am looking into the future 2 years, 4 years, 10 years.

"*Mr. Miller:* Unquestionably, conceivably in the future, again I assume a need would be shown, this concept could be expanded." *Hearings,* 261.

As Mr. Miller himself suggested, if need existed for the expansion of Federal jurisdiction over fraud, beyond existing limitations as indicated in *Kann* and *Parr*, Congress would no doubt respond to the extent clearly required to meet the demonstrated need. For example, earlier in the Senate hearings just referred to, the Attorney General referred to *France v. United States*, 164 U.S. 676, as indicating a need for broader legislation relating to lotteries. *Hearings*, 8. In the *France* case, transportation of certain lottery documents after the conclusion of a particular lottery drawing was held not within the scope of 18 U.S.C. § 1301 (even though the particular drawing was one of a series occurring twice daily). The Court held:

> "The statute does not cover the transaction, and however reprehensible the acts of the plaintiffs in error may be thought to be, we cannot sustain a conviction on that ground. Although the objection is a narrow one, yet the statute being highly penal, rendering its violator liable to fine and imprisonment, we are compelled to construe it strictly. . . . If it be urged that the act of these plaintiffs in error is within the reason of the statute, the answer must be that it is so far outside of its language that to include it within the statute would be to legislate and not to construe legislation." 164 U.S. 682-83.

At the request of the Attorney General, Congress subjected lottery activities to the broader coverage of 18 U.S.C. § 1952 (Supp. III 1962).